United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7155

United States Court of Appeals

For the Second Circuit.

DONALD SCHANBARGER,

Plaintiff-Appellant,

against

SUPERINTENDENT OF THE NEW YORK STATE POLICE, DISTRICT ATTORNEY OF ALBANY COUNTY, DIRECTOR OF ALBANY COUNTY PROBATION DEPARTMENT, SHERIFF OF ALBANY COUNTY and ALBANY COUNTY JUDGE JOHN J. CLYNE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

Brief for Defendants-Appellees, District Attorney of Albany County, Director of Albany County Probation Department, Sheriff of Albany County and Albany County Judge John J. Clyne.

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THE REPORTER COMPANY, INC., Walton, N. Y. 13856—607 865-4161—1976

Table of Contents.

TABLE OF AUTHORITIES.

Page

STATUTES.

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Statement of the Issues Presented for Review.

The issue is whether the complaint states causes of action under the Personal Rights Clause of the 10th Amendment, and the Equal Protection and Due Process Clauses of 14th Amendment, with jurisdiction asserted under these amendments and Title 42 U.S.C. §1983 and 28 U.S.C. §1343 (3) and (4), which would entitle the plaintiff to the injunctive relief sought in the complaint.

A Statement of the Case.

The plaintiff in the instant case filed a summons and "complaint of denial of constitutional rights" on July 15th, 1975, in the United States District Court for the Northern District of New York at Utica, New York.

The summons and complaint was served upon the District Attorney of Albany County, the Director of Albany County Probation Department, the Sheriff of Albany County, and Albany County Judge John J. Clyne. The Albany County Attorney's office appeared for the above-named defendants. The Superintendent of New York State Police was also served and was represented by the Attorney General's office of the State of New York.

The Attorney General on behalf of the Superintendent of New York State Police moved for dismissal of the complaint. The Albany County Attorney moved to dismiss the claims asserted against the Albany County officials named as defendants in this action. The plaintiff served a paper entitled a "Notice of Motion to Deny Motion to Dismiss." The matter was returnable on the 15th day of September, 1975, at the United States District Court for the Northern District of New York at the Court House in Albany, New York.

The matter was heard by James T. Foley, District Judge, who rendered a memorandum decision and order dated February 11th, 1976, and granted the motions to dismiss the complaint for failure to state claim against any of the named defendants upon which relief could be granted. The complaint was dismissed in its entirety.

Briefly stated, the plaintiff alleges a civil action for deprivation of rights under Title 42 U.S.C. Section 1983.

Facts.

On May 9th, 1974, the plaintiff was parked in front of a business establishment at approximately midnight repairing the Volkswagen camper, referred to in the complaint (App. 1). He was approached by two New York State Police Troopers and asked for his registration. He refused to reply to the request and he refused to display a registration (App. 1, App. 22). He was placed under arrest by the State Police at which time two other State Police Troopers arrived on the scene, searched his camper and took possession of the camper.

The plaintiff was taken before a Town Justice in the Town of Colonie and charged with certain violations of the Vehicle and Traffic Law and the Penal Law (App. 2, App. 22).

The Police Justice of the Town of Colonie remanded the plaintiff to the Albany County Jail. While at the jail, the Albany County District Attorney's office entered the case on behalf of the people. The District Attorney's office reduced the charges and the plaintiff went to trial on July 17th, 1974 (App. 2). The plaintiff was given a suspended sentence and placed on one-year probation in August of 1974. The plaintiff was told to report for presentence investigation to the Albany County Probation Department by the Town Justice. The plaintiff reported as directed but refused to answer any questions or cooperate (App. 2). The plaintiff served a notice of appeal and served a show cause order for a stay of sentence during the appeal.

The plaintiff again came before the Police Justice in consideration of his sentence and probation as he had not entered into any probation arrangements with the County

Probation Department (App. 3). The plaintiff at a hearing on this issue requested the Probation Officer, Mark T. Connors, to admit that the Probation Officer parked in the fire lane on Columbia Street, which allegation was denied by Mr. Connors. The plaintiff argued that he had been ordered to report to an office staffed by known discreditable people who use their position at the department to avoid paying parking tickets and obstruct governmental administration (App. 3). The plaintiff was confined to the Albany County Jail for ninety (90) days by the Town Justice. The plaintiff was in the Albany County Jail from October 7th, 1974 until October 30th, 1974, when he was released by order of County Judge John Clyne (App. 4). The said Judge John Clyne waived court rules for appeal and received the submitted briefs of the plaintiff.

On February 19th, 1975, the plaintiff commenced an action against John J. Clyne for a decision on his said appeal. On March 17th, 1975, the County Judge reversed the convictions and no further action was taken in the matter. The plaintiff's Volkswagen motor vehicle was taken from the parking area at the time of his arrest and placed in a garage.

POINT I.

The complaint does not state facts sufficient to form viable causes of action under 42 United States Code, Section 1983, depriving the plaintiff of or violating his constitutional right

The complaint of the plaintiff alleges that it is a "complaint of denial of constitutional rights" under the 10th and 14th amendments as well as Section 1983 of Title 42 of the United States Code.

Section 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitutional laws, shall be liable to the parties injured in an action at law, suit and equity, or other proper proceeding for redress" (42 U.S.C. §1983).

The complaint alleges as its first cause of action a rather general catch-all statement which seems to allege that each and every one who came in contact with the plaintiff was involved in a conspiracy to deny him his constitutional rights. The plaintiff's statements are general and conclusory and the relief requested is that the various officials be barred from performing their duties of Sheriff, District Attorney, Probation Department Personnel, and County Judge.

The claimant has not alleged viable claims to indicate in any degree that he was deprived of or had his constitutional rights violated (*Adickes v. Kress and Co.*, 398 U. S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 [1970]).

The relief sought by the plaintiff is an injunctive one asking that the United States District Court bar the various defendants on the County level from performance of their duties. The complaint is a hodgepodge of vague and conclusory allegations. No facts are presented which would be sufficient to support a claim for injunctive relief. The plaintiff is not incarcerated, he is not being affected by any action at the present time nor is he under any threat that such action will be taken by the Sheriff,

County Judge, District Attorney, or Probation Department. This plaintiff is entitled to no injunctive relief. There is no performance at the present time or any threat of performance to deprive this plaintiff of any civil rights and there is no allegation in the entire complaint alleging an ongoing action that would require the remedy of an injunction (*Powell v. Jarvis*, 460 F. 2d 551 [1972]).

The relief asked under the particular Section 1983 complaint against the County Judge, John J. Clyne, is improper. The first cause of action set out in the complaint includes the County Judge, John J. Clyne, in an overall conspiracy (App. 1), by joining all of the paragraphs in the complaint under that cause of action in a new paragraph for a second cause of action (App. 8) under number 28. The complaint indicates, that by reason of the aforesaid conspiracy in which the defendant failed to act without excessive delay, that the plaintiff demands any decision required by law in a criminal case be rendered within the time limitation of a civil case without litigation. The plaintiff requested "a permanent injunction against accepting any additional case for consideration when any previous case received for consideration has not been acted within two months" (App. 8).

In order to qualify for relief under Section 1983 certain conditions must be met and one is that the person whom relief is sought against must be a person within the meaning of the Civil Rights Act and not be cloaked with immunity.

Under the common law, judges were immune from liability for damages for acts committed within their judicial jurisdiction; the immunity applies even when the judge is accused of acting maliciously and corruptly. The

error if any may be corrected on appeal, but the judge should not have to fear that unsatisfied litigants may hound him with litigation charging malice, corruption or conspiracy. Imposing such a burden upon judges would contribute not to principles of fearless decision making but to wavering intimidation.

> "We do not believe that this principle of law was abolished by Section 1983 which made liable every person who under color of law deprives another person of his civil rights" (*Pierson v. Ray*, 386 U. S. 547 [1967], 87 S. Ct. 1213, 18 L. Ed. 2d 288).

Judge John J. Clyne is not a person contemplated under Section 1983 of this code, thus he is immune under the circumstances of this case from suit.

The first catch-all cause of action listed in the complaint is also against the Director of the Albany County Probation Department (App. 1). The third cause of action alleged in the complaint (App. 9) alleges the preceding twenty-five (25) paragraphs and also alleges that the defendant's probation department or office and personnel entered into a conspiracy and the plaintiff requires the said office to be staffed with creditable people. He asks for "a permanent injunction against the questioning of a criminal defendant when any member of the questioner's staff is relieved from criminal liability because of their position."

A close reading and understanding of the complaint would appear to indicate that because a particular Probation Officer, Mark T. Connors, who was not specifically named as a defendant, refused to admit that he parks in a fire lane on Columbia Street in Albany, he is a discreditable person. It could be also inferred from reading the complaint that the said member, Mark T. Connors,

as most or all of the members of the said department park in the fire lane and use their position to avoid paying parking tickets and obstruct governmental administration. Because the said Mr. Connors would not admit to being a discreditable person, the plaintiff claims that he was deprived of his prime defense in that he, the plaintiff, refused to associate with or report to a place staffed by discreditable people (App. 3, App. 9). He then asks for his injunction enjoining the Probation Department of Albany County from employing on its staff such discreditable people. Said people are not to question any criminal defendant since they themselves are relieved of criminal liability because of their position of being on the staff.

The alleged statements or acts do not state a viable cause of action which deprive one of his constitutional rights under Section 1983. On its face, the complaint is insufficient and devoid of any allegations of facts indicating a deprivation of civil rights because Mr. Connors would not admit to parking in fire lanes.

The catch-all first cause of action in general, the fourth cause of action (App. 9), and the fifth cause of action (App. 10), and the sixth cause of action (App. 11) in particular are alleged against the District Attorney of Albany County. The plaintiff states that there is a conspiracy between the District Attorney and the Police Department and he alleges and requests that the District Attorney not appear in any case in which a member of a police force is the complainant in any such capacity. He also asks for an "injunction against appearing as a prosecutor in any case that has a member of a police force as a complainant acting as such governmental official" (App. 10).

The complaint also alleges a conspiracy and the plaintiff requires that the District Attorney "not engineer, urge, seek, or accept information about a criminal defendant that is prepared by a Probation Department" (App. 11). He also seeks an injunction on this point. The plaintiff also indicates in his sixth cause of action at paragraph 41 (App. 11) that the Assistant District Attorney at the trial before the Police Justice said "that he did not have information of the plaintiff's innocence." He asked for relief by reason of the aforesaid conspiracy that the defendant, District Attorney, does not attempt to present any case without adequate preparation, or with a want of fairness or candor or obstruct the administration of justice. He asks as usual for a permanent injunction against the attempted presentation of any case without adequate preparation or with a want of fairness or candor or obstruction of the administration of justice.

As stated in *Dacey v. New York County Lawyers Association,* a public prosecutor possesses the same immunity in an action which seeks to hold him personally liable for official acts under Section 1983 as he does in a similar action for malicious prosecution (*Dacey v. New York County Lawyers Association,* 423 F. 2d 188 [1969]).

The issue of the District Attorney's involvement was considered in *Fine v. The City of New York.* "The Court held that the complaint against the Assistant District Attorney, therefore, must fall, for their presentation of evidence to the Grand Jury under the circumstances of this case is insulated from liability under 42 U.S.C. §1983" (*Fine v. The City of New York,* 520 F. 2d 70 [1975]).

In our particular case, the District Attorney did not even present to a grand jury any direct evidence against the plaintiff for which he might seek redress under the color of law.

In our particular case, the District Attorney's office reduced the charges and proceeded forward with the remaining charges. The complaint does not state facts sufficient to form a cause of action under 42 U.S.C. §1983 either on its face by delineating specific acts performed which would be the basis for a viable claim or does it show any reason why the immunity to the official acts of the public prosecutor should not stand as a bar.

The presentation of evidence and the prosecution of cases is precisely the prosecutorial function often requiring principle and fearless decision making that an immunity rule is designed to promote (*Fanale v. Sheehy*, 383 F. 2d 866 [2nd Cir. 1969]).

No facts have been alleged or presented on the part of the defendant, District Attorney, which are not within his official responsibility and he is immune under the circumstances of this particular case.

Needless to say, an action was brought against the Director of Albany County Probation Department and the Sheriff of Albany County and the District Attorney of Albany who were not personally involved. To grant the relief of injunction for deprivation of rights under 42 U.S.C. §1983, the defendant must be involved personally, acting under the color of law as a public official. He must be personally involved as a responsible party, exercising direction and control and putting forth a pattern of supervisory conduct which bring him personally into the events. This is not so under the circumstances of this case. The complaint should fail on this basis alone (*Johnson v. Glick*, 481 F. 2d 1028 [2nd Cir. 1973]).

POINT II.

The United States District Court does not have the power to entertain the complaint and grant the injunctive relief requested under the facts and circumstances of this case.

The complaint alleges conspiracy and deprivation of the plaintiff's rights under Title 42 of the U. S. C. Section 1983. The request is made for injunctive relief against all parties named in the complaint and in particular against the officials in office in Albany County acting on a county-wide basis.

The complaint does not allege any facts to show actions which are ongoing in nature and which require injunctive relief to dispel immediate and irreparable harm.

The complaint asks for injunctive relief against something in the future which has no effect on the plaintiff. He is not under the threat of immediate harm, there is no alleged immediate harm, and there are no civil or criminal actions in which he is a defendant.

We call your attention to *Rizzo v. Goode*. The thoughts expressed in this case seem to be applicable to the factual situation with which we are presented (*Rizzo v. Goode*, U. S. , 46 L. Ed. 2d 561, 96 S. Ct. [Jan. 21, 1976]).

The scope of the remedy being asked for in this particular case is a permanent injunction against all of the individuals. It is broad, all encompassing, and virtually would call to a standstill any effective performance on the part of the District Attorney, the Probation Department, the Sheriff and the County Judge.

In analyzing the complaint and the relief requested, it would appear that there has developed a dispute or disagreement between the plaintiff and those individuals who happened to be involved either directly or indirectly in his arrest and the due process involved in the prosecution of the charges. The plaintiff's requested relief attempts to turn this simple dispute into a reorganization of every county department and every county position headed by the defendants.

Simply stated, we think the alleged violation does not give rise to such injunctive relief.

Section 1983 by its terms confers authority to grant equitable relief • • •, but its words, "allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding" (*Giles v. Harris*, 189 U. S. 475, 486, 87 L. Ed. 909, 23 S. Ct. 639 [1903] [Holmes, J.]). This thought was expressed in *Rizzo v. Goode* along with the clear and truly understanding fiat that an injunction is to be used sparingly, and only in a clear and plain case (*Irwin v. Dixon*, 9 How. 10, 33, 13 L. Ed. 25, 1850).

There is no clear and plain case set forth by the plaintiff in which to grant such extraordinary and exceptional relief as to prevent the various County Officials from performing their duties.

There is raised a theory as expressed in *Rizzo v. Goode* that the federal courts should not interfere unwarrantedly in the operation of state courts and state governments. It is expressed that interference be sparingly applied by the federal court where injunctive relief is requested against an executive branch or agency of the state or a local government.

It would appear that there must be a clear, ongoing, viable, consistent pattern or actions to warrant injunctive relief by the United States District Court.

The immediate situation in our particular case involves one individual who was arrested, stood trial and had his conviction reversed. He certainly underwent all the phases involved in due process. He is not being indicted; he is not under any threat of criminal suit or prosecution; he is not under any threat or involved in any civil proceeding where he is a defendant; and he is not confined against his will. There are no continuing present adverse effects to which the plaintiff is being subject.

This is not a case in which the United States District Court has the obligation or the right to grant an injunction. Where, as here, the exercise of authority by state officials on a county level is attacked, federal courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law" (*Rizzo v. Goode*, 46 L. Ed. 2d 561, U. S. , 96 S. Ct. [Jan. 21, 1976]; *Stefanelli v. Minard*, 342 U. S. 117, 120, 96 L. Ed. 138, 72 S. Ct. 118 [1951], quoted in *O'Shea v. Littleton*, 414 U. S. 488, 38 L. Ed. 2d 674, 94 S. Ct. 669 [1974]).

When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the government has judicially been granted the widest latitude in the dispatch of its own internal affairs. As stated in *Rizzo v. Goode* the principles of noninterference where interference is not warranted, not giving massive injunctive relief sought where not warranted, is also applicable to the executive branch or agency of the state and local governments.

The injunctive relief requested in the complaint against the District Attorney, the Director of Albany County Probation Department, and the Sheriff of Albany County must be denied.

CONCLUSION.

The order of the United States District Judge dismissing the complaint in its entirety should be affirmed.

Respectfully submitted,

ROBERT G. LYMAN,
Albany County Attorney for
Defendants-Appellees,
District Attorney of Albany County,
Director of Albany County Probation Department, Sheriff of Albany County, and Albany County Judge John J. Clyne.

THOMAS J. WALSH,
Assistant County Attorney,
On the Brief.

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